

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LISA COLLEY, Individually and on Behalf of All Others Situated, Plaintiff,
v.
OREXIGEN THERAPEUTICS, INC., *et al.*, Defendants.

GERALD J. STEFANKO, Individually and on Behalf of All Others Similarly Situated
v.
OREXIGEN THERAPEUTICS, INC., *et al.*, Defendants.

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) Civil No. 15cv540 L (KSC)
) Civil No. 15cv549 JAH (JLB)
) Civil No. 15cv557 L (KSC)

ORDER GRANTING MOTIONS FOR CONSOLIDATION [ECF Nos. 26, 29, 32]; GRANTING MOTION FOR APPOINTMENT OF LEAD PLAINTIFF [ECF No. 37] and DENYING MOTIONS FOR APPOINTMENT OF LEAD PLAINTIFF [ECF Nos. 27, 33]; GRANTING MOTION FOR APPROVAL OF LEAD PLAINTIFF'S SELECTION OF COUNSEL [ECF No. 38] and DENYING MOTIONS FOR APPROVAL OF LEAD COUNSEL [ECF Nos. 28, 34, 35]

1 KURT R. YANTZ and CLAUDIA)
 2 KNIGHT, Individually and on Behalf of)
 All Others Similarly Situated,)
 3 v.)
 4 OREXIGEN THERAPEUTICS, INC., *et*)
al.,)
 5 Defendants.)
 6)
 7

8 Three related putative class action lawsuits alleging violations of §§ 10(b) and 20(a) of
 9 the Securities Exchange Act of 1934 (“Exhange Act”) and Securities Exchange Commission
 10 (“SEC”) Rule 10b-5, 17 C.F.R. §240.10b-5, are pending before the Court. Plaintiffs bring these
 11 actions on behalf of all purchasers of Orexigen Therapeutics, Inc. (“Orexigen”) securities
 12 between March 3, 2015 and March 5, 2015, against Orexigen, and two senior executive officers,
 13 Michael A. Narachi and Joseph P. Hagan. Various parties now seek to consolidate the three
 14 cases, and move for appointment as lead plaintiff and for appointment of lead counsel. The Court
 15 determines the motions on the papers submitted without oral argument.

16 **A. Motions to Consolidate Cases**

17 All parties agree that consolidation of the three cases is appropriate because they each
 18 involve substantially similar issues of law and fact. *See FED. R. CIV. P. 42(a).* Each of the related
 19 actions allege that Orexigen made false or misleading statements or failed to disclose to
 20 investors that (1) the studies released by Orexigen showing that its obesity drug, Contrave,
 21 reduced the risk of heart attacks and cardiovascular death were unreliable and misleading; (2)
 22 Orexigen was confronted by potential fines, civil penalties, and recall of Contrave from the
 23 market; and (3) consequently, Orexigen’s financial statements were materially false and
 24 misleading at the relevant times. Having reviewed the pleadings, the Court concurs that
 25 consolidation of the related actions is warranted. *See 15 U.S.C. §78u-4(a)(3)(B)(ii).*

26 **B. Motion for Appointment as Lead Plaintiff**

27 The Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u–4, governs
 28 the selection of a lead plaintiff in private securities class actions: the lead plaintiff is to be the

1 “most capable of adequately representing the interests of class members.” 15 U.S.C. §
 2 78u–4(a)(3)(B)(i). There is a three-step process in determining the lead plaintiff under the
 3 PSLRA. *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). The first plaintiff to file an action
 4 governed by the PSLRA must publicize the pendency of the action, the claims made, and the
 5 purported class period “in a widely circulated national business-oriented publication or wire
 6 service.” 15 U.S.C. § 78u–4(a)(3)(A)(i)(I). This notice must also alert the public that “any
 7 member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. §
 8 78u–4(a)(3)(A)(i)(II).

9 Next, the court must select the presumptive lead plaintiff. *See In re Cavanaugh*, 306 F.3d
 10 at 729–30 (citing 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I)). In order to determine the presumptive lead
 11 plaintiff, “the district court must compare the financial stakes of the various plaintiffs and
 12 determine which one has the most to gain from the lawsuit.” *Id.* at 730 (footnote omitted). After
 13 the court identifies the plaintiff with the most to gain, the court must determine whether that
 14 plaintiff, based on the information he provides, “satisfies the requirements of Rule 23(a), in
 15 particular those of ‘typicality’ and ‘adequacy.’” *Id.* If that occurs, that plaintiff becomes the
 16 presumptive lead plaintiff. *Id.* If not, the court selects the plaintiff with the next-largest financial
 17 stake and determines whether that plaintiff satisfies the requirements of Rule 23. *Id.* The court
 18 repeats this process until it selects a presumptive lead plaintiff. *Id.*

19 Finally, plaintiffs not selected as the presumptive lead plaintiff may “rebut the
 20 presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality and adequacy
 21 requirements.” *Id.* (citing 15 U.S.C. § 78u–4(a)(3)(B)(iii)(II)). This is accomplished by
 22 demonstrating the presumptive lead plaintiff either “will not fairly and adequately protect the
 23 interests of the class” or “is subject to unique defenses that render such plaintiff incapable of
 24 adequately representing the class.” 15 U.S.C. § 78u–4(a)(3)(B)(iii)(II)(aa)-(bb). If the court
 25 determines that the presumptive lead plaintiff does not meet the typicality or adequacy
 26 requirement, then it must return to step two, select a new presumptive lead plaintiff, and again
 27 allow the other plaintiffs to rebut the new presumptive lead plaintiff’s showing. *In re Cavanaugh*,
 28 306 F.3d at 731. The court repeats this process “until all challenges have been exhausted.” *Id.*

1 (citation and footnote omitted).

2 **1. Notice**

3 On March 10, 2015, Lisa Colley filed the first of the three related cases. On that same
 4 date, Notice of the class action suit was published in *Business Wire*, a national business-oriented
 5 publication. The Notice publicized the pendency of the action, the claims made, and the
 6 purported class period “in a widely circulated national business-oriented publication or wire
 7 service.” 15 U.S.C. § 78u-4(a)(3)(A)(i)(I). The Notice also alerted the public that “any member
 8 of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. §
 9 78u-4(a)(3)(A)(i)(II).

10 **2. Largest Financial Interest**

11 The movants have provided information concerning their financial losses in this
 12 litigation:

13 Movant Karim Khoja asserts losses of approximately \$74,181. [ECF No. 37-3];

14 Movant Hau Dang asserts losses of approximately \$44,182. [ECF No. 35-4];

15 The Orexigen Investors Group asserts losses of approximately \$21,800. [ECF No. 27-5];

16 Movant Nicholas Mennona asserts losses of approximately \$11,868. [ECF No. 33-5].

17 As noted above, the PSLRA provides that “the ‘most capable’ plaintiff – and hence the
 18 lead plaintiff – is the one who has the greatest financial stake in the outcome of the case,” so
 19 long as that plaintiff meets the requirements of Federal Rule of Civil Procedure 23. *In re*
 20 *Cavanaugh*, 306 F.3d at 729. It is undisputed that Karim Khoja has the largest financial interest
 21 in this matter.

22 Khoja also has established that he satisfies the requirements of Rule 23(a), specifically
 23 typicality and adequacy. See *In re Cavanaugh*, 306 F.3d at 732. Here, Khoja’s claims arise from
 24 the same course of conduct and the same operative facts that allegedly damaged other members
 25 of the purported class: Khoja purchased Orexigen’s securities during the Class Period in reliance
 26 upon defendants’ purported false and misleading statements, and suffered damages as a result.
 27 Thus, Khoja’s claims are typical under Rule 23.

28 The test for adequacy is meant to determine whether the class representative and his

1 counsel “have any conflicts of interest with other class members” and whether the class
 2 representative and his counsel will “prosecute the action vigorously on behalf of the class.”
 3 *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). There is no suggestion of conflicts
 4 between Khoja and other class members. Nor is there any showing that Khoja is subject to any
 5 unique defenses

6 Khoja’s interests are not antagonistic to those of the class members and he has sufficient
 7 interest in the outcome of the litigation to ensure that he will vigorously prosecute it.
 8 Accordingly, the Court finds that, for purposes of lead plaintiff appointment, Khoja has made a
 9 showing satisfying the adequacy requirement of Rule 23.

10 Because Khoja has the greatest financial stake and satisfies the requirements of Rule
 11 23(a), he is presumptively the most adequate plaintiff to represent the class. This presumption
 12 may be rebutted only upon proof by a member of the purported plaintiff class that Khoja either
 13 (1) “will not fairly and adequately protect the interests of the class,” or (2) “is subject to unique
 14 defenses that render [it] incapable of adequately representing the class.” 15 U.S.C. §
 15 78u4(a)(3)(B)(iii)(II). No party has opposed Khoja’s motion for appointment as lead plaintiff.
 16 Accordingly, the presumption that Khoja is the most adequate lead plaintiff has not been
 17 rebutted, and the Court therefore need not proceed to consider the motion of the movant with the
 18 next largest financial stake. *See In re Cavanaugh*, 306 F.3d at 730–31. Absent proof that the lead
 19 plaintiff candidate with the largest financial interest does not satisfy the requirements of FRCP
 20 23, said candidate is “entitled to lead plaintiff status.” *In re Cavanaugh*, 306 F.3d at 732. Thus,
 21 Khoja is entitled to be the lead plaintiff in this action.

22 **B. Motion to Appoint Counsel**

23 Under the PLSRA, the lead plaintiff is given the right, subject to court approval, to “select
 24 and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). “[T]he district court
 25 should not reject a lead plaintiff’s proposed counsel merely because it would have chosen
 26 differently.” *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 711 (9th Cir. 2009) (citation omitted).
 27 “[I]f the lead plaintiff has made a reasonable choice of counsel, the district court should
 28 generally defer to that choice.” *Id.* at 712 (citations omitted).

1 Khoja moves to have his selection of Kahn Swick & Foti, LLC approved as lead counsel.
2 The Court has reviewed the firm's resume, *See* Abadou Decl., Exh. D, ECF No. 37-6, and is
3 satisfied that the lead plaintiff has made a reasonable choice of counsel. The Kahn Swick & Foti
4 firm has extensive experience in the prosecution of securities class actions and it appears that it
5 will adequately represent the interests of all class members. Accordingly, the Court defers to
6 Khoja's choice in counsel.

7 **D. Conclusion**

8 Based on the foregoing, **IT IS ORDERED:**

9 1. The motions to consolidate cases are **GRANTED**. All documents filed shall bear
10 the caption *In re Orexigen Therapeutics, Inc., Securities Litigation*, 15cv540 L (KSC). A
11 consolidated amended complaint shall be filed within 20 days of the filing of this Order.
12 Defendants shall answer or otherwise respond to the amended consolidated complaint within 20
13 days of the filing of the amended consolidated complaint.

14 2. Karim Khoja's motion for appointment as lead plaintiff is **GRANTED**. The
15 Orexigen Investor Group, Nicholas Menonna, and Hau Dang's motions for appointment as lead
16 plaintiff are **DENIED**.

17 3. Karim Khoja's motion for approval of lead plaintiff's selection of counsel is
18 **GRANTED**. The Orexigen Investor Group, Nicholas Menonna, and Hau Dang's motions for
19 approval of their selection for lead counsel are **DENIED**.

20 **IT IS SO ORDERED.**

21 DATED: June 22, 2015

22 
23 M. James Lorenz
United States District Court Judge

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1 COPY TO:

2 HON. JOHN A. HOUSTON
3 UNITED STATES DISTRICT JUDGE

4 HON. KAREN S. CRAWFORD
5 UNITED STATES MAGISTRATE JUDGE

6 HON. JILL L. BURKHARDT
7 UNITED STATES MAGISTRATE JUDGE

8 ALL PARTIES/COUNSEL

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